A

NOR HAZLIZA ISMAIL & ANOR v. MOHAMED YUSOFF SHAIK MADAR

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
HASHIM HAMZAH JCA
B WONG KIAN KHEONG JCA
[CIVIL APPEAL NO: P-04(IM)-5-01-2023]
5 FEBRUARY 2024

C **Abstract** – *(i) Section 68(1)(f) of the Courts of Judicature Act 1964 is only applicable to applications filed and determined by the High Court in exercising its original jurisdiction as the court in the first instance and not in exercising its appellate jurisdiction. It does not restrict the Court of Appeal from hearing and determining appeals arising from the judgment or order of the High Court in the exercise of its appellate* D *jurisdiction against the decision of the subordinate courts; (ii) Once the nature of a dispute concerns predominantly public law matters, an applicant cannot be allowed to circumvent the mandatory requirements in a judicial review application stipulated in O. 53 rr. 3(1) to (3) and (6) of the Rules of Court 2012*

E

CIVIL PROCEDURE: *Appeal – Competency of – Whether appeal competent by virtue of amended s. 68(1)(f) of Courts of Judicature Act 1964 ('CJA') – Applicability of – Whether amendment restricts Court of Appeal from hearing and determining* F *appeals arising from judgment or order of High Court in exercise of its appellate jurisdiction against decision of Sessions Court – Whether there was clear distinction between High Court's appellate civil jurisdiction and Court of Appeal's appellate civil jurisdiction – Whether court's rehearing power in ss. 29 and 67(1) of CJA concerns court's 'jurisdiction' to hear cases – Whether court should enforce party's right to appeal*

G

CIVIL PROCEDURE: *Action – Mode of commencement – Nature of dispute – Whether predominant nature of suit involved public law elements – Whether plaintiff ought to have filed judicial review application – Whether plaintiff should not be allowed to circumvent mandatory requirements in judicial review application as stipulated in O. 53 rr. 3(1) to (3) and (6) of Rules of Court 2012*

H

STATUTORY INTERPRETATION: *Courts of Judicature Act 1964 – Section 68(1)(f) – Amendment – Interpretation of word 'application' – Whether connotes application to strike out writ or pleading filed before High Court – Whether s. 68(1)(f) only applicable to applications filed and determined by High Court in* I *exercising its original jurisdiction as court in first instance and not in exercising its appellate jurisdiction – Whether there was clear distinction between High Court's appellate civil jurisdiction and Court of Appeal's appellate civil jurisdiction*

WORDS & PHRASES: *'decision' – Courts of Judicature Act 1964, s. 3 – Whether decision constitutes 'order' – Whether decision appealable*

The plaintiff was a former employee of the second defendant, a local authority established under s. 3 of the Local Government Act 1976 by the Penang State Authority. The first defendant was an accountant with the second defendant's Finance Department. On 8 December 2020, a few months after he retired, the plaintiff filed an action in the Sessions Court against the defendants, claiming among other things, that the defendants had defamed him. The plaintiff's cause of action against the defendants was based on a letter issued by the first defendant in which a surcharge action for the loss of Government's movable assets was taken against the plaintiff. A sum of RM429.68 was deducted in five equal amounts from his monthly salary *ie*, from February 2019 until June 2019. In his claim, the plaintiff also sought the refund of the deducted salaries. The defendants filed an application to strike out the plaintiff's writ and statement of claim under O. 18 r. 19(1)(b) and/or (d) of the Rules of Court 2012 ('ROC'). The Sessions Court allowed the defendants' application with costs and the plaintiff's writ and statement of claim were struck out. The plaintiff appealed to the High Court against the decision of the Sessions Court. The High Court allowed the plaintiff's appeal and set aside the decision of the Sessions Court. The defendants filed this appeal against the decision of the High Court. The plaintiff raised a preliminary objection grounded on these two issues (i) whether the defendants had a competent appeal before this court by the recently amended s. 68(1)(f) of the Courts of Judicature Act 1964 ('CJA'); and (ii) whether the plaintiff was correct to file a defamation suit against the defendants by way of writ action.

Held (allowing appeal)
Per Hashim Hamzah JCA delivering the judgment of the court:

(1) Applying the plain and ordinary meaning of the word 'application' to s. 28(1)(c) of the CJA, it categorically refers to the application to strike out a writ or pleading which was filed before the subordinate courts. In a similar vein, the word 'application' in s. 68(1)(f) of the CJA must necessarily connote the application to strike out a writ or pleading which is filed before the High Court. Herein, the application to strike out the plaintiff's writ and statement of claim was filed by the defendants in the subordinate court *ie*, the Sessions Court. It was the Sessions Court that decided to allow the defendants' application to strike out the plaintiff's writ and statement of claim. At the time when the appeal was filed against the decision of the Sessions Court, the amendment of the CJA had not yet taken place. (paras 18 & 19)

(2) When the High Court heard the plaintiff's appeal, it was doing so in the exercise of its appellate jurisdiction. When this matter came before this court, this court was exercising its jurisdiction to hear and determine appeals from the order of the High Court made in the exercise of its

appellate jurisdiction (s. 67 of the CJA). The amendment to the CJA does not restrict the Court of Appeal from hearing and determining appeals arising from the judgment or order of the High Court in the exercise of its appellate jurisdiction against the decision of the subordinate courts, which allowed an application to strike out any writ or pleading. There was no room to impose the unambiguous, plain and ordinary meaning of the words in s. 68(1)(f) of the CJA on the surrounding facts of the present case. Hence, s. 68(1)(f) of the CJA is only applicable to applications filed and determined by the High Court in exercising its original jurisdiction as the court in the first instance and not in exercising its appellate jurisdiction. (paras 20-24)

(3) The fact that an appeal is heard by way of a rehearing does not take away the fact that the application to strike out the plaintiff's writ and statement of claim was filed at the Sessions Court and not the High Court. The amendment to the CJA had not yet taken place at the time when the plaintiff appealed to the High Court. Regardless of whether the High Court dismisses or allows the appeal, the aggrieved party still has the right to appeal against the decision of the High Court as there is no such restriction in the amendment to the CJA for such circumstances. If this was indeed the intention of the Legislature, it would have expressly stated in the amendment to the CJA. Hence, regardless of whether the appeal to the High Court or the Court of Appeal was approached by way of a rehearing, the pertinent fact remained that the application was filed in the Sessions Court and not the High Court. Therefore, s. 68(1)(f) of the CJA was not applicable to this appeal. (paras 36 & 37)

(4) The plaintiff's cause of action for defamation was based on the alleged defamatory statements contained in a letter by the defendants. The contents of the said letter were merely to remind the plaintiff that he had not paid the surcharge amount. On the face of it, there was no trace of any defamatory statements in the said letter against the plaintiff. In essence, the plaintiff was challenging the second defendant's decision to impose the surcharge against the plaintiff on the loss of their department's assets. In fact, the plaintiff was claiming, among others, for the refund of the total sum deducted from his salary because of the surcharge, which was also a remedy permitted in a judicial review application. This could not be determined without an examination of the validity of the public law decision and action to proceed with the surcharge against the plaintiff. Therefore, even though there was a mixture of private law and public law in the plaintiff's claim against the defendants, the public law element was predominant. As such, the procedure under O. 53 of the ROC must be adopted by the plaintiff. If otherwise, the plaintiff's action may be struck out on the grounds of abuse of the court's process. (paras 41-45)

(5) The plaintiff should have applied for judicial review against the decision of the defendants and should not be allowed to circumvent the pre-condition of filing a judicial review application as required under O. 53 of the ROC. It was plain and obvious that the plaintiff's action against the defendants was an abuse of court process, frivolous and vexatious. The Sessions Court was correct in its decision to allow the defendant's application to strike out the plaintiff's writ and statement of claim. The preliminary objections raised by the plaintiff had no basis. (paras 47-49)

Per Wong Kian Kheong JCA (concurring):

(1) The High Court's decision (reinstatement of this suit) fell within the definition of 'decision' in s. 3 of the CJA. If this appeal was allowed by the Court of Appeal, this suit would be struck out. In such an event, the rights of the plaintiff would be finally disposed of within the meaning of s. 3 of the CJA. Accordingly, the High Court's decision constitutes an 'order' under s. 3 of the CJA which is appealable to the Court of Appeal pursuant to s. 67(1) of the CJA and the plaintiff's first preliminary objection would be dismissed. (para 58)

(2) Section 28(1)(a) to (d) of the CJA curtail the right of parties to appeal to the High Court (High Court's appellate civil jurisdiction) against decisions of 'subordinate courts' (defined in s. 3 of the CJA) which involve the exercise of the original jurisdiction of the subordinate courts. Section 68(1)(a) to (g) of the CJA restrict the right of parties to appeal to the Court of Appeal (Court of Appeal's appellate civil jurisdiction) in respect of decisions made by the High Court in the invocation of the High Court's original jurisdiction. The term 'application' employed in s. 68(1)(f) of the CJA makes it clear that Parliament only intends to curtail parties' right to appeal to the Court of Appeal against decisions of the High Court with regard to 'applications' which have been filed in the High Court (not in the subordinate courts). The court's power to 'rehear' an appeal in s. 29 of the CJA (when the High Court's appellate civil jurisdiction is invoked) and s. 69(1) of the CJA (in respect of the exercise of the Court of Appeal's appellate civil jurisdiction) did not deprive the Court of Appeal of jurisdiction to hear this appeal. (para 61)

(3) The fact that Parliament has deliberately placed s. 28 of the CJA in Part II of the CJA and s. 68 of the CJA in Part III of the CJA means that there is a clear distinction between the High Court's appellate civil jurisdiction (in Part II of the CJA) and the Court of Appeal's appellate civil jurisdiction (in Part III of the CJA). If this court accepted the view that this appeal was not appealable pursuant to s. 68(1)(f) of the CJA, this would be contrary to the clear demarcation of Part II and Part III of the CJA by the Legislature; and this would render redundant s. 16 of the Interpretation Acts 1948 and 1967. (para 62)

(4) A party's right of appeal to the Court of Appeal against a decision of the High Court is expressly provided by s. 67(1) of the CJA. Act A1661 (which introduces s. 68(1)(f) of the CJA) has not, either expressly or by necessary implication, repealed the defendants' right to file this appeal pursuant to s. 67(1) of the CJA. Furthermore, courts cannot and should not on their own motion curtail the party's right to appeal (Court of Appeal). If written law had conferred the party's right to appeal (Court of Appeal), courts should merely enforce the party's right to appeal. If otherwise, courts may be misperceived by parties in particular and the public in general, to have impeded the parties' access to the appellate courts, be it the High Court or the Court of Appeal. (para 62)

(5) The court's rehearing power in ss. 29 and 67(1) of the CJA does not concern the court's 'jurisdiction' to hear cases. There is a distinction between the court's 'jurisdiction' and 'power'. If the Court of Appeal is not barred by s. 68(1)(f) of the CJA from having 'jurisdiction' to hear this appeal, this 'jurisdiction' of the Court of Appeal could not be negated by the JC's reliance on the court's rehearing power in s. 69(1) of the CJA. If otherwise, the jurisdiction of the High Court and Court of Appeal would be unlawfully curtailed by the court's rehearing power. The plaintiff's second preliminary objection was dismissed. (para 62)

(6) Once the nature of a dispute concerned public law matters only or predominantly public law matters, a claimant could not be allowed to circumvent three mandatory requirements in a judicial review application as stipulated in O. 53 rr. 3(1) to (3) and (6) of the ROC which were (i) in accordance with O. 53 rr. 3(1) and (2) of the ROC, an applicant in a judicial review application has to obtain prior leave of the High Court; (ii) O. 53 r. 3(3) mandatorily requires the applicant to serve all cause papers regarding the judicial review application on the Attorney General's Chambers ; and (iii) an applicant has to comply with the mandatory time period to file the judicial review application as provided in O. 53 r. 3(6) of the ROC. As judicial review applications concern public law matters, it is in the public interest as well as in the interest of the applicants for the judicial review applications to be filed expeditiously. The plaintiff, in this appeal, should not be allowed to circumvent the abovementioned requirements by filing this suit. (paras 66 & 67)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

AJS v. JMH & Another Appeal [2022] 1 CLJ 331 FC ***(refd)***

Datuk Bandar Majlis Bandaraya Shah Alam & Anor v. Yusuf Awang & Ors [2007] 4 CLJ 253 CA ***(refd)***

Government Of Malaysia v. Zainal Hashim [1977] CLJU 86; [1977] 1 LNS 86 FC ***(refd)***

Lee Lee Cheng v. Seow Peng Kwang [1959] CLJU 107; [1959] 1 LNS 107 CA ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***
Mohamed Yusoff Shaik Madar v. Nor Hazliza Ismail & Anor [2023] 3 CLJ 868 HC ***(refd)***
National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***
Quilter v. Mapleson [1881-2] 9 QBD 672 ***(refd)***
Spring Max Capital Sdn Bhd v. Johari Hasan & Ors And Another Case [2020] CLJU 315; [2020] 1 LNS 315 HC ***(refd)***
Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC ***(refd)***
Wan Sagar Wan Embong v. Harun Taib [2008] 5 CLJ 14 FC ***(refd)***
Young Yean Chin & Ors v. Quek Yak Kang & Ors [2016] 6 CLJ 860 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 71
Courts of Judicature (Amendment) Act 2022, ss. 2, 8
Courts of Judicature Act 1964, ss. 3, 28(1)(a), (b), (c), (d), 29, 67(1), 68(1)(a), (b), (c), (d), (e), (f), (g), 69(1)
Interpretation Acts 1948 and 1967, ss. 2(1)(b), 16
Local Government Act 1976, s. 3
Rules of Court 2012, O. 18 r. 19(1)(b), (d), O. 53 r. 3(1), (2), (3), (6), (7)

For the appellants - Karin Lim Ai Ching, Murgan D Maniam & Thanganachiar; M/s Presgrave & Matthews
For the respondent - Amareson K Velu & Kernail Singh Popvinder Singh; M/s Baljit Singh & Co

[Editor's note: For the High Court judgment, please see Mohamed Yusoff Shaik Madar v. Nor Hazliza Ismail & Anor [2023] 3 CLJ 868 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Hashim Hamzah JCA:

Introduction

[1] For ease of reference, the parties to the present appeal shall be referred to as they were in the Sessions Court.

[2] The plaintiff was a former employee of the second defendant, a local authority established under s. 3 of the Local Government Act 1976 by the Penang State Authority. The first defendant was an accountant with the second defendant's Finance Department. The plaintiff retired from service on 19 April 2020.

[3] On 8 December 2020, which was a few months after he retired from service, the plaintiff filed an action in the Sessions Court against the defendants, claiming, among other things, that the defendants had defamed him. The plaintiff's cause of action against the defendants was based on a

letter issued by the first defendant on 7 February 2019, in which a surcharge action for the loss of the Government's movable assets was taken against the plaintiff. A sum of RM429.68 was deducted in five equal amounts from his monthly salary, *ie*, from February 2019 until June 2019. In his claim, the plaintiff also sought the refund of the deducted salaries.

[4] On 23 August 2021, the defendants filed an application to strike out the plaintiff's writ and statement of claim under O. 18 r. 19(1)(b) and/or (d) of the Rules of Court 2012 ("ROC 2012"). On 15 April 2022, the Sessions Court allowed the defendants' application with costs. The plaintiff's writ and statement of claim were struck out.

[5] On 19 April 2022, the plaintiff appealed to the High Court against the said decision of the Sessions Court. On 30 December 2022, the High Court allowed the plaintiff's appeal and set aside the decision of the Sessions Court. The case was consequently remitted to the Sessions Court for trial.

[6] On 6 January 2023, the defendants filed this appeal against the decision of the High Court.

Preliminary Objection

[7] Before us, learned counsel for the plaintiff raised a preliminary objection grounded on two of the following issues, namely:

(i) whether the defendants have a competent appeal before this court by the recently amended s. 68(1)(f) of the Courts of Judicature Act 1964 ("CJA 1964"); and

(ii) whether the plaintiff was correct to file a defamation suit against the defendants by way of writ action.

First Issue: Competency Of The Defendants' Appeal

[8] Learned counsel for the plaintiff submitted that the defendants' appeal before us is not competent by virtue of s. 68(1)(f) of the CJA 1964. According to learned counsel for the plaintiff, the said provision relinquishes the defendants' right to appeal against the decision of the High Court in which the defendants' application to strike out the plaintiff's writ and statement of claim was dismissed.

[9] Learned counsel for the defendants, on the other hand, contended that s. 68(1)(f) of the CJA 1964 does not operate retrospectively. It was further contended that the said provision is only applicable to applications decided by the High Court in its original jurisdiction and at the first instance, but not in its appellate jurisdiction.

[10] Therefore, the paramount issue to be determined is whether s. 68(1)(f) of the CJA 1964 is applicable to this appeal.

[11] For ease of reference, s. 68 of the CJA 1964 is reproduced below:

Section 68. Non-appealable matters.

(1) **No appeal shall be brought to the Court of Appeal** in any of the following cases:

(a) when the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit except with the leave of the Court of Appeal;

(b) where the judgment or order is made by consent of parties;

(c) where the judgment or order relates to costs only which by law are left to the discretion of the Court, except with the leave of the Court of Appeal;

(d) where, by any written law for the time being in force, the judgment or order of the High Court, is expressly declared to be final;

(e) where a High Court dismissed any application for a summary judgment;

(f) **where a High Court dismissed any application to strike out any writ or pleading; and**

(g) where a High Court dismissed any application to set aside a judgment in default.

(emphasis added)

[12] The amendment to s. 68 of the CJA 1964 came into force on 1 October 2022 (see P.U.(B) 451/2022) through s. 8 of the Courts of Judicature (Amendment) Act 2022 [Act A1661].

[13] Through s. 2 of the same Amending Act, s. 28 of the CJA 1964 was also amended as follows:

Section 28. Civil appeals from subordinate courts.

(1) **No appeal shall lie to the High Court** in any of the following cases:

(a) subject to any other written law, from a decision of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject matter is ten thousand ringgit or less except on a question of law;

(b) where a subordinate court dismissed any application for a summary judgment;

(c) **where a subordinate court dismissed any application to strike out any writ or pleading:** and

(d) where a subordinate court allowed any application to set aside a judgment in default.

(emphasis added)

[14] In other words, based on the above amendments to the CJA 1964, when a subordinate court dismisses an application to strike out any writ or pleading, the party whose application was dismissed does not have any right to appeal to the High Court against the said decision. Likewise, when a High Court dismisses an application to strike out any writ or pleading, the party whose application was dismissed does not have any right to appeal to the Court of Appeal against the said decision.

[15] We are guided by the trite rules of statutory interpretation, which have been expounded by the Federal Court in *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561; [2020] 4 MLJ 721 in the following words:

> [30] In our opinion, the rules governing statutory interpretation may be summarised as follows. *First in construing a statute effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used bv the legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing anv statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. Second, if, however the words employed are not clear, then the court may adopt the purposive approach* in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. *Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural ordinary meaning*. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court "to travel outside them on a voyage of discovery are strictly limited". *Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment*. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance. *An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect of it in the achievement to the declared objective*. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such, the court is permitted to read additional words into a statutory provision where clear reason for doing so are to be found in the statute itself.
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> (emphasis added)

[16] This principle was recently reiterated by the Federal Court in *AJS v. JMH & Another Appeal* [2022] 1 CLJ 331.

[17] In our view, the contention of both parties revolves around the interpretation of the word 'application' under s. 68(1)(f) of the CJA 1964. In *Black's Law Dictionary*, the term 'application' is defined as follows:

> Application. **A putting to, placing before, preferring a request or petition to or before a person. The act of making a request for something**. *In re Meyer*, 166 N. Y.S. 505, 100 Misc. 587. A written request to have a certain quantity of land at or near a certain specified place. *Biddle v. Dougal*, 5 Bin. (Pa.) 151. A petition. *Scott v. Strobach*, 49 Ala. 477, 489. *Gardner v. Goodner Wholesale Grocery Co.*, 113 Tex. 423, 256 S.W. 911, 913. The use or disposition made of a thing. A bringing together, in order to ascertain some relation or establish some connection; as the application of a rule or principle to a case or fact.
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> (emphasis added)

[18] Applying the plain and ordinary meaning of the word 'application' to s. 28(1)(c) of the CJA 1964, we hold that it categorically refers to the application to strike out a writ or pleading which was filed before the subordinate courts. In a similar vein, the word 'application' in s. 68(1)(f) of the CJA 1964 must necessarily connote the application to strike out a writ or pleading which is filed before the High Court.

[19] In the present case, the application to strike out the plaintiff's writ and statement of claim was filed by the defendants in the subordinate court, *ie*, the Sessions Court. It was the Sessions Court that decided to allow the defendants' application to strike out the plaintiff's writ and statement of claim. At the time when the appeal was filed against the decision of the Sessions Court, the amendment of the CJA 1964 had not yet taken place.

[20] No such application was filed before the High Court. When the High Court heard the plaintiff's appeal, it was doing so in the exercise of its appellate jurisdiction. When this matter came before us, we were exercising our jurisdiction to hear and determine appeals from the order of the High Court made in the exercise of its appellate jurisdiction (see s. 67(1) of the CJA 1964).

[21] In our considered view, the amendment to the CJA 1964 does not restrict the Court of Appeal from hearing and determining appeals arising from the judgment or order of the High Court in the exercise of its appellate jurisdiction against the decision of the subordinate courts, which allows an application to strike out any writ or pleading.

[22] We do not see any room to impose the unambiguous, plain, and ordinary meaning of the words in s. 68(1)(f) of the CJA 1964 on the surrounding facts of the present case.

[23] On a side note, as an aid of statutory interpretation, we believe our view is in line with the object and intent of the amendment to the CJA 1964, as evident by the speech of the then Deputy Minister at the Prime Minister's Office when the bill was tabled for second and third reading on 25 July 2022 in Parliament:

> ... Cadangan pindaan kepada Akta Mahkamah Kehakiman 1964 [Akta 91] *melibatkan dua perkara utama iaitu mengehadkan rayuan untuk kes-kes interlokutori sivil* dan penyediaan dokumen dan rekod rayuan bebas kertas dalam prosiding perbicaraan rayuan jenayah ...
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> ... Kaedah perubahan substantif yang dicadangkan ialah dengan *mengehadkan rayuan dari Mahkamah Rendah ke Mahkamah Tinggi dan dari Mahkamah Tinggi ke Mahkamah Rayuan* dengan mengehadkan rayuan dalam kes-kes permohonan interlokutori yang tidak memprejudiskan hak pihak-pihak ...
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> ... Keduanya, berkenaan pindaan seksyen 28. Fasal 2 rang undang-undang *bertujuan untuk meminda seksyen 28, Akta 91 untuk mengehadkan hak untuk merayu dari mahkamah rendah ke Mahkamah Tinggi* dalam kes sivil, dalam hal keadaan jika *mahkamah rendah itu menolak* mana-mana permohonan untuk penghakiman terus atau *mana-mana permohonan untuk membatalkan mana-mana writ ataupun pliding* atau membenarkan mana-mana permohonan peruntukan mengetepikan penghakiman ingkar ...
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> ... Pindaan seksyen 68. Fasal 8 *bertujuan untuk meminda seksyen 68. Akta 91 bagi mengehadkan hak untuk merayu dari Mahkamah Tinggi ke Mahkamah Rayuan* dalam kes sivil, dalam hal keadaan Mahkamah Tinggi itu menolak mana-mana permohonan untuk penghakiman terus mana-mana permohonan untuk membatalkan mana-mana writ ataupun pliding dan membenarkan mana-mana permohonan untuk mengetepikan penghakiman ingkar.
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> (emphasis added)

[24] Hence, we agree with learned counsel for the defendants that s. 68(1)(f) of the CJA 1964 is only applicable to applications filed and determined by the High Court in exercising its original jurisdiction as the court in the first instance and not in exercising its appellate jurisdiction.

[25] However, learned counsel for the plaintiff submitted that the appeal before the High Court was determined through a rehearing pursuant to s. 29 of the CJA 1964. In short, when the High Court heard the defendants' appeal against the decision of the Sessions Court, the High Court was rehearing the defendants' application to strike out the plaintiff's claim.

[26] It follows that the decision of the High Court in allowing the plaintiff's appeal was, in effect, a dismissal of the defendants' application to strike out the plaintiff's pleading, and therefore, s. 68(1)(f) of the CJA 1964 is applicable. This is the same reasoning made by the learned JC in his grounds of judgment.

[27] We disagree with learned counsel for the plaintiff based on the following reasons. A

[28] Section 29 of the CJA 1964 states that:

> Section 29. Civil appeals to be by way of re-hearing.
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> **All civil appeals** from a subordinate court shall be by way of re-hearing, and the **High Court shall have the like powers and jurisdiction** on the hearing of appeals **as the Court of Appeal** has on the **hearing of appeals from the High Court**. B
>
> (emphasis added)

[29] Section 69 of the CJA 1964 also states that: C

> Section 69. Hearing of appeals.
>
> (1) *Appeals to the Court of Appeal shall be by way of re-hearing*, and in relation to such appeals the *Court of Appeal shall have all the powers and duties*, as to amendment or otherwise, *of the High Court together with full discretionary power to receive further evidence* by oral examination in court or through a remote communication technology, by affidavit, or by deposition taken before an examiner or commissioner. D
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> (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matter which have occurred after the date of the decision from which the appeal is brought. E
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> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.
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> (4) *The Court of Appeal may draw inferences of fact and give any judgment and make any order which ought to have been given or made, and make such further or other orders as the case requires.* F
>
> (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties although the respondents or parties have not appealed from or complained of the decision. G
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> (emphasis added)

[30] An appeal by way of a rehearing entails the following.

[31] Firstly, when an appeal is heard by way of a rehearing, the appellate court should not regard the appeal as a review of the exercise of the judge's discretion (see *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182; [1987] 2 MLJ 183 and *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283; [1984] 2 MLJ 300). H I

[32] Secondly, the word 'rehearing' is defined in *Black's Law Dictionary* as a second consideration to bring to the appellate court's attention any error, omission, or oversight in the first consideration, as can be seen below:

> Rehearing. **Second consideration** of cause for sole purpose of **calling to court's attention any error, omission, or oversight in first consideration**. *Lake v. State*, 100 Fla. 373, 129 So. 827, 829. A retrial of issues and presumes notice to parties entitled thereto and opportunity for them to be heard. *Yee v. State Board of Equalization of California*, 16 Cal. App. 2d 417, 60 P.2d 322, 323.
>
> (emphasis added)

[33] Thirdly, the appellate court is authorised to make such an order on appeal as ought to be made according to the law at the date of appeal and not at the date of the trial. In *Government Of Malaysia v. Zainal Hashim* [1977] CLJU 86; [1977] 1 LNS 86; [1977] 2 MLJ 254b, the Federal Court, through His Lordship Suffian LP (as he then was), cited with approval the decision by the UK Court of Appeal in *Quilter v. Mapleson* [1881-2] 9 QBD 672 and held as follows:

> Appeals to this court are by way of rehearing and we may give any judgment, make any order which ought to have been given or made (by the trial court and make such further or other orders as the case requires, s. 69(1) and (4) of the Courts of Judicature Act No. 7 of 1964. This means, on the authority of *Quilter v. Mapleson* (1881-2) 9 QBD 672 that **we are authorised to make such order on this appeal as ought to be made according to the law as it stands not at the time of the trial but at the time of this appeal**.
>
> (emphasis added)

[34] Fourthly, the appellate court is entitled to touch upon issues not touched upon by the learned trial judge. This court in *Datuk Bandar Majlis Bandaraya Shah Alam & Anor v. Yusuf Awang & Ors* [2007] 4 CLJ 253; [2007] 7 MLJ 327 held as follows:

> [60] On this ground alone, I find it justified to allow prayer 1 of encl. 1. *Though it is true that the learned trial judge had not touched on this principal issue despite having heard arguments on it during the hearing* of encl 1, nevertheless, *since this appeal is by way of a re-hearing* s. 69(1) of the Courts of Judicature Act 1964) *I am permitted to arrive at the conclusion as stated*.
>
> (emphasis added)

[35] Lastly and most importantly, the provision that an appeal is a rehearing means that the appeal is a rehearing of what was placed as evidence before the trial court. In short, the appellate court may look at and re-assess the evidence presented before the trial court for the sake of justice in the case. We affirm our earlier decision in *Young Yean Chin & Ors v. Quek Yak Kang & Ors* [2016] 6 CLJ 860, in which it was held as follows:

> [27] Though the learned High Court Judge had disregarded the defendants' afidavit balasan, (and we agree for the reason we have stated above), **we as the appellate court may look at the evidence for the sake**

> **of justice of the case. This is permissible** under s. 69(1) of the CJA 1964 and r. 5(1) of the Rules of the Court of Appeal 1994 where it provides that **hearing of civil appeal by the Court of Appeal is by way of rehearing. That means that we can reassess the evidence adduced before the trial court**.
>
> (emphasis added)

[36] In our view, the fact that an appeal is heard by way of a rehearing does not take away the fact that the application to strike out the plaintiff's writ and statement of claim was filed at the Sessions Court and not the High Court. We are mindful that the amendment to the CJA 1964 had not yet taken place at the time when the plaintiff appealed to the High Court. Hypothetically, if the application is dismissed by the Sessions Court, then s. 28(1)(c) of the CJA 1964 is applicable to restrict an appeal against the decision of the Sessions Court to be brought before the High Court. If the application is allowed, then the party against whom the decision was made may file an appeal to the High Court against the said decision, which the plaintiff did in the present case. Regardless of whether the High Court dismisses or allows the appeal, we are of the view that the aggrieved party still has the right to appeal against the decision of the High Court as there is no such restriction in the amendment to the CJA 1964 for such circumstances. If this is indeed the intention of the Legislature, it would have been expressly stated in the amendment to the CJA 1964.

[37] Hence, we are of the view that regardless of whether the appeal to the High Court or the Court of Appeal is approached by way of a rehearing, the pertinent fact remains that the application was filed in the Sessions Court and not the High Court. Therefore, s. 68(1)(f) of the CJA 1964 is not applicable to this appeal.

[38] We find no merit in this issue and have dismissed the same.

Second Issue: Mode Of Commencement

[39] Before we proceed with this issue, we find it pertinent to note that the plaintiff raised the issue of the correct mode of commencement of the proceeding in his preliminary objection. After careful perusal of the appeal records, we also found that this is the core issue in the defendants' striking out application against the plaintiff's writ and statement of claim. Regardless, this issue will be dealt with accordingly, as follows.

[40] Learned counsel for the plaintiff submitted that the plaintiff was correct to file a defamation suit against the defendants by way of writ action and not by way of judicial review application.

[41] Firstly, according to learned counsel for the plaintiff, the plaintiff's cause of action for defamation was based on the alleged defamatory statements contained in a letter dated 7 February 2019 by the defendants.

[42] We have gone through the said letter and found that the contents of the said letter were merely to remind the plaintiff that he had not paid the surcharge amount as of 6 February 2019. On the face of it, we could not trace any defamatory statements in the said letter against the plaintiff.

[43] Secondly, learned counsel for the plaintiff submitted that the plaintiff is not challenging any decision by the authorities, *ie*, the defendants, pertaining to the surcharge imposed against the plaintiff. This is because there is no tribunal, trial or proceeding initiated by the second defendant against the plaintiff.

[44] However, we agree with learned counsel for the defendants that this argument is misconceived since the decision of the second defendant to deduct the plaintiff's salary for February, March, April, May, and June 2019 was pursuant to a surcharge proceeding stipulated under the Treasury Instructions and Federal Treasury Circulars. It can be seen in the plaintiff's pleading that, in essence, the plaintiff is challenging the second defendant's decision to impose the surcharge against the plaintiff on the loss of their department's assets. In fact, the plaintiff was claiming, among others, for the refund of the total sum deducted from his salary because of the surcharge, which was also a remedy permitted in a judicial review application. This cannot be determined without an examination of the validity of the public law decision and action to proceed with the surcharge against the plaintiff.

[45] Therefore, based on the entire factual matrix of this appeal, even though there is a mixture of private law and public law in the plaintiff's claim against the defendants, we found that the public law element is predominant. As such, the procedure under O. 53 of the ROC 2012 must be adopted by the plaintiff. If otherwise, the plaintiff's action may be struck out on the grounds of abuse of the court's process.

[46] The Federal Court speaking through James Foong FCJ in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865 held as follows:

> [62] We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 RHC. *If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has a substantial public law element then the procedure under O. 53 RHC must be adopted. Otherwise, it may be set aside on the around that it abuses the court's process*. But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 RHC is not suitable. Aside from this, there could be other circumstances like the kind in *YAB Dato' Dr Zambry*. Much depends on the facts of the case. But generally the court should be circumspect in allowing a matter which should be by way of O. 53 RHC to proceed in

> another form. To say that it is open to an applicant seeking judicial review to elect any mode he prefers, as implied in *Kuching Waterfront*, would, in our considered opinion, be rendering O. 53 RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration, then this rule must be adhered to, except in the limited and exceptional circumstances discussed.
>
> (emphasis added)

[47] Based on the above, we hold that the plaintiff in the present case should have applied for judicial review against the decision of the defendants and should not be allowed to circumvent the precondition of filing a judicial review application as required under O. 53 of the ROC 2012.

[48] In a nutshell, based on these two grounds, it is plain and obvious that the plaintiff's action against the defendants is an abuse of court process, frivolous and vexatious. In our view, the Sessions Court was correct in its decision to allow the defendants' application to strike out the plaintiff's writ and statement of claim.

Conclusion

[49] In conclusion, based on the preceding reasons, we have come to a unanimous decision that the preliminary objection raised by the plaintiff in this appeal has no basis. Therefore, we dismiss the plaintiff's preliminary objection to this appeal.

[50] We find merit in this appeal, and with this, we allow this appeal. Consequently, the High Court's decision is set aside, and the Session Court's decision is restored.

[51] We allow costs of RM5,000 for the preliminary objection to be paid by the plaintiff to the defendants, subject to the allocatur. We allow costs of RM20,000 for the appeal here and below, subject to the allocatur. We further order for the costs at the High Court which was already paid by the defendants to be refunded.

Wong Kian Kheong JCA (supporting):

Introduction

[52] In the above appeal (this appeal), I have been previously given the draft written judgment of my learned brother, Hashim Hamzah JCA (Hashim Hamzah JCA's judgment).

[53] Hashim Hamzah JCA's judgment has provided the reasons why we have allowed this appeal with costs (our decision).

[54] I concur with Hashim Hamzah JCA's judgment and wish to provide additional grounds in support of our decision (supporting judgment).

[55] This supporting judgment shall refer to parties as they were in the Sessions Court.

Is This Appeal Competent?

[56] The plaintiff's learned counsel had raised the following two preliminary objections (POs) against this appeal, namely:

(i) the High Court's decision which had set aside the Sessions Court's order to strike out of this suit (High Court's decision (reinstatement of this suit)) was not a "decision" as understood in s. 3 of the Courts of Judicature Act 1964 (CJA). Consequently, the Court of Appeal has no jurisdiction to hear this appeal (plaintiff's first PO); and

(ii) with effect from 1 October 2022, Parliament has amended CJA by way of the Courts of Judicature (Amendment) Act 2022 (Act A1661). Act A1661 has introduced, among others, a new para. (f) in s. 68(1) CJA which bars this appeal (plaintiff's second PO).

Plaintiff's First PO

[57] The definition of "decision" in s. 3 and s. 67(1) of the CJA are reproduced below:

Interpretation

s. 3. *In this Act, unless the context otherwise requires:*

...

"decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties;

s. 67. *Jurisdiction to hear and determine civil appeals*

(1) *The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this* or any other *written law regulating the terms and conditions upon which such appeals shall be brought.*

(emphasis added)

[58] With respect to the plaintiff's learned counsel, I am of the view that the High Court's decision (reinstatement of this suit) falls within the definition of "decision" in s. 3 of the CJA. This is because if this appeal is allowed by the Court of Appeal, this suit will be struck out. In such an event, the rights of the plaintiff are finally disposed of within the meaning of s. 3 of the CJA. Accordingly:

(i) the High Court's decision (reinstatement of this suit) constitutes an "order" under s. 3 of the CJA which is appealable to the Court of Appeal pursuant to s. 67(1) of the CJA; and

(ii) the plaintiff's first PO is dismissed with costs.

Plaintiff's Second PO

[59] Sections 28(1), 29, 68(1) and 69(1) of the CJA provide as follows:

s. 28. *Civil appeals from subordinate courts.*

(1) *No appeal shall lie to the High Court in any of the following cases:*

(a) subject to any other written law, from a decision of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject matter is ten thousand ringgit or less except on a question of law;

(b) where a subordinate court dismissed any application for a summary judgment;

(c) *where a subordinate court dismissed any application to strike out any writ or pleading;* and

(d) where a subordinate court allowed any application to set aside a judgment in default.

s. 29. *Civil appeals to be by way of re-hearing.*

All civil appeals from a subordinate court shall be by way of re-hearing, and the High Court shall have the like powers and jurisdiction on the hearing of appeals as the Court of Appeal has on the hearing of appeals from the High Court.

s. 68. Non-appealable matters.

(1) *No appeal shall be brought to the Court of Appeal in any of the following cases:*

(a) when the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit, except with the leave of the Court of Appeal;

(b) where the judgment or order is made by consent of parties;

(c) where the judgment or order relates to costs only which by law are left to the discretion of the Court, except with the leave of the Court of Appeal;

(d) where, by any written law for the time being in force, the judgment or order of the High Court, is expressly declared to be final;

(e) where a High Court dismissed any application for a summary judgment;

(f) *where a High Court dismissed any application to strike out any writ or pleading*; and

(g) where a High Court dismissed any application to set aside a judgment in default.

s. 69. *Hearing of appeals.*

(1) *Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court*, together with full

A

> discretionary power to receive further evidence by oral examination in court or through a remote communication technology, by affidavit, or by deposition taken before an examiner or commissioner.
>
> (emphasis added)

B **[60]** The written judgment of the learned Judicial Commissioner (JC) in support of the High Court's decision (reinstatement of this suit) has been reported in [2023] 3 CLJ 868. In the learned JC's written judgment, at [1] to [4], [7] to [10], [12] to [16] and [18] to [21], he has expressed the following view that this appeal is barred by s. 68(1)(f) of the CJA:

C

> [1] *This judgment deals with the applicability of the recent amendments to s. 68 [CJA].*
>
> [2] *Section 68 provides that no appeal can be brought to the Court of Appeal when the High Court dismisses an application to strike out a writ or a pleading.*
>
> [3] *Here, the defendants in the Sessions Court suit filed an application to strike out* D *the plaintiff's writ and statement of claim. The Sessions Court allowed their application. The plaintiff appealed to the High Court. I allowed the plaintiff's appeal, that is, I reversed the decision of the Sessions Court. Effectively, I dismissed the defendants' application to strike out.*
>
> [4] *The issue is – do the defendants have the right to appeal to the Court of Appeal* E *against my decision, when my decision was to effectively dismiss their application to strike out?*
>
> ...
>
> [7] If the High Court dismisses an application to strike out a writ and a pleading, such as an application under O. 18 r. 19 of the Rules of the F Court 2012 (*RC*), there is no longer a right to appeal to the Court of Appeal against the High Court's decision.
>
> [8] *It is true that my decision to dismiss the defendants' application to strike out did not emanate from a High Court suit. It started from a Sessions Court suit. In the Sessions Court suit, the defendants applied to strike out. The Sessions Court allowed* G *their application. The plaintiff, whose suit was struck out, appealed to the High Court. I heard and allowed his appeal. And it is against my decision that the defendants are now appealing to the Court of Appeal.*
>
> [9] *But the appeal that I heard is an interlocutory appeal. Interlocutory appeals are determined by the process of re-hearing. In other words, when I heard this striking* H *out appeal, it was as if I re-heard the application to strike out that was filed in the Sessions Court.*
>
> [10] *Order 55 r. 2 [RC] provides for this principle ...*
>
> ...
>
> [12] *When I allowed the plaintiff's appeal, I effectively dismissed the defendants'* I *application to strike out. It is clear then that sub-s. 68(1) applies to prohibit a further appeal to the Court of Appeal, since I refused the defendants' application to strike out the plaintiff's claim.*

The Rationale For The Amendments To Section 68 (And s. 28) [CJA]

[13] *Focusing specifically on paras. 68(1)(e) to (f) [CJA], the amendments seek to achieve the purpose of taking away the right to appeal to the Court of Appeal*: (i) when an application for summary judgment is dismissed; (ii) *when an application to strike out is dismissed*; and (iii) when an application to set aside a judgment in default is allowed.

[14] *When any of these three decisions or outcomes occur, the effect is that the suit goes to trial. When an application for summary judgment is dismissed, the suit proceeds to be determined at trial. When an application to strike out is dismissed, the suit proceeds to trial to be determined. When an application to set aside a judgment in default is allowed, the suit similarly proceeds to trial to be determined.*

[15] The latest amendments to sub-s. 68(1) [CJA] curtail appeals or further appeals to the Court of Appeal. The latest equivalent amendments to sub-s. 28(1) [CJA] have the same corresponding purpose of curbing appeals from the Subordinate Courts to the High Court. *The rationale or purpose is so that the appellate courts are not further inundated with these interlocutory appeals (summary judgment, striking out and setting aside of a default judgment).*

[16] *The parties get one opportunity or attempt at persuading the first instance court to grant summary judgment, to strike out a suit or pleading, or to sustain a default judgment. And if the first instance court does not grant summary judgment, does not strike out the suit or a pleading, or does not sustain a default judgment then the parties have to go to trial to determine their dispute.*

...

[18] *These interlocutories – summary judgment, striking out and setting aside a default judgment – are the exceptions, rather than the rule. The rule is to go to trial. This is because the trial process is the essence and the bedrock of our legal process.*

The Applicability Of Sub-s. 68(1) [CJA]

[19] In this matter, the Sessions Court allowed the defendants' application to strike out on 15 April 2022. The plaintiff filed his appeal on 19 April 2022. His right to appeal to the High Court was unaffected because the Sessions Court struck out his suit. The amended sub-s. 28(1) did not affect his right to appeal from the Sessions Court to the High Court.

[20] *But I heard and allowed the plaintiff's appeal on 30 December 2022, which was after the date that the amendments to sub-s. 68(1) came into effect (1 October 2022).*

[21] *I am therefore of the view that the current sub-s. 68(1), specifically through para. (f), is applicable to this appeal, rendering this appeal of no effect.*

(emphasis added)

[61] I agree with the reasons expressed in Hashim Hamzah JCA's judgment that this appeal is not barred by the new s. 68(1)(f) of the CJA. According to Hashim Hamzah JCA, among others:

(i) section 28(1)(a) to (d) of the CJA curtail the right of parties to appeal to the High Court (High Court's appellate civil jurisdiction) against decisions of "subordinate courts" (defined in s. 3 of the CJA) which involve the exercise of the original jurisdiction of the subordinate courts;

(ii) section 68(1)(a) to (g) of the CJA restrict the right of parties to appeal to the Court of Appeal (Court of Appeal's appellate civil jurisdiction) in respect of decisions made by the High Court in the invocation of the High Court's original jurisdiction. The term "application" employed in s. 68(1)(f) of the CJA makes it clear that Parliament only intends to curtail parties' right to appeal to the Court of Appeal against decisions of the High Court with regard to "applications" which have been filed in the High Court (not in the subordinate courts);

(iii) the court's power to "rehear" an appeal (court's rehearing power) in:

(a) section 29 of the CJA (when the High Court's appellate civil jurisdiction is invoked); and

(b) section 69(1) of the CJA (in respect of the exercise of the Court of Appeal's appellate civil jurisdiction)

– does not deprive the Court of Appeal of jurisdiction to hear this appeal.

[62] I am of the view that the above decision by Hashim Hamzah JCA may be fortified by the following reasons:

(i) the CJA has been revised under the Revision of Laws Act 1968. According to s. 2(1)(b) of the Interpretation Acts 1948 and 1967 (IA), Part 1 of the IA applies to the construction of CJA.

Section 16 of the IA (in Part 1 of the IA) states as follows:

> **Notice to be taken of division into parts**, chapters, *etc.*
>
> 16. **Where an Act** or subsidiary legislation **is divided into parts** or chapters or otherwise, **the fact and particulars of the division shall**, without express mention thereof in the Act or subsidiary legislation, **be taken notice of in all courts and for all purposes whatsoever**.
>
> (emphasis added)

Section 16 of the IA has been applied in *Spring Max Capital Sdn Bhd v. Johari Hasan & Ors And Another Case* [2020] CLJU 315; [2020] 1 LNS 315; [2021] 2 MLRH 449. In *Spring Max Capital*, at [54(1)], the High Court has taken judicial cognisance of Part VI (Of Certain Relations Resembling Those Created By Contract) of the Contracts Act 1950 (CA) in the construction of s. 71 of the CA (in Part VI of the CA).

Section 28 has been placed in Part II CJA as follows:

Part II
The High Court
General

...

Appellate Jurisdiction

...

s. 28. **Civil appeals from subordinate courts**

(emphasis added)

Part III of the CJA states as follows, among others:

Part III
The Court of Appeal
General

...

Appellate Jurisdiction - Civil Appeals

...

s. 68. **Non-appealable matter.**

(emphasis added)

The fact that Parliament has deliberately placed s. 28 of the CJA in Part II CJA and s. 68 of the CJA in Part III of the CJA means that there is a clear distinction between the High Court's appellate civil jurisdiction (in Part II of the CJA) and the Court of Appeal's appellate civil jurisdiction (in Part III of the CJA). If we accept the learned JC's above view that this appeal is not appealable pursuant to s. 68(1)(f) of the CJA:

(a) this will be contrary to the clear demarcation of Part II and Part III of the CJA by the Legislature; and

(b) this will render redundant s. 16 of the IA;

(ii) a party's right of appeal to the Court of Appeal against a decision of the High Court is expressly provided by s. 67(1) of the CJA [party's right to appeal (Court of Appeal)]. Act A1661 (which introduces s. 68(1)(f) CJA) has not, either expressly or by necessary implication, repealed the defendants' right to file this appeal pursuant to s. 67(1) of the CJA. Furthermore, courts cannot and should not on their own motion, curtail the party's right to appeal (Court of Appeal). This is because if written law has conferred the party's right to appeal (Court of Appeal), courts should merely enforce the party's right to appeal (Court of Appeal). If

otherwise, courts may be misperceived by parties in particular and the public in general, to have impeded the parties' access to the appellate courts, be it the High Court or the Court of Appeal.

I rely on the following judgment of the Federal Court delivered by Ariffin Zakaria FCJ (as he then was) in *Wan Sagar Wan Embong v. Harun Taib* [2008] 5 CLJ 14; [2008] 4 MLJ 473, at [7]:

> [7] *We agree with the respondent that an appeal is maintainable where statute and rules of procedure provide for it. Appeal is a right created by statute and the courts cannot create or take away such a right …*
>
> (emphasis added)

(iii) the court's rehearing power in ss. 29 and 67(1) of the CJA does not concern the court's "jurisdiction" to hear cases. There is a distinction between the court's "jurisdiction" and "power". I cite the following judgment of Thomson CJ (as he then was) in the Federation of Malaya's Court of Appeal in *Lee Lee Cheng v. Seow Peng Kwang* [1959] CLJU 107; [1959] 1 LNS 107; [1960] 1 MLJ 1, at 3:

> *It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly. This leads to the view that in the [Courts Ordinance 1948] there is a distinction between the jurisdiction of a Court and its powers, and this suggests that the word "jurisdiction" is used to denote the types of subject matter which the Court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers.*
>
> (emphasis added)

If the Court of Appeal is not barred by s. 68(1)(f) of the CJA from having "jurisdiction" to hear this appeal, this "jurisdiction" of the Court of Appeal cannot be negated by the learned JC's reliance on the court's rehearing power in s. 69(1) of the CJA. If otherwise, the "jurisdiction" of the High Court and Court of Appeal will be unlawfully curtailed by the court's rehearing power.

I am not able to find any case in Malaysia and other common law countries where the court's jurisdiction to hear an appeal is restricted by the court's rehearing power. It is to be noted that the learned JC has not cited any Malaysian case or any case from a common law jurisdiction to support his view regarding the curtailment of a party's right to appeal (Court of Appeal) by the court's rehearing power.

[63] In view of the reasons stated in Hashim Hamzah JCA's judgment as well as the reasons explained in the above para. 62, the plaintiff's second PO must be dismissed with costs.

Whether The Plaintiff Should Have Filed A Judicial Review Application (JRA)

[64] I associate myself with Hashim Hamzah JCA's judgment that the predominant nature of this suit involves public law elements and not private law matters. On this ground alone, this appeal should be allowed with costs.

[65] According to O. 53 rr. 3(1) to (3), (6) and (7) of the RC:

> O. 53 r. 3 *Leave*
>
> (1) *An application under this Order shall not be made unless leave therefor has been granted in accordance with this rule.*
>
> (2) *An application for leave must be made ex parte to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.*
>
> (3) *The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.*
>
> ...
>
> (6) *An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.*
>
> (7) *The Court may, upon an application, extend the time specified in rule 3(6) if it considers that there is a good reason for doing so.*
>
> (emphasis added).

[66] In my view, once the nature of a dispute concerns:

(i) public law matters only; or

(ii) predominantly public law matters

– a claimant cannot be allowed to circumvent three mandatory requirements in a JRA as stipulated in O. 53 rr. 3(1) to (3) and (6) of the RC (three mandatory requirements). The three mandatory requirements are as follows:

(a) in accordance with O. 53 rr. 3(1) and (2) of the RC, an applicant in a JRA (applicant) has to obtain prior leave of the High Court (first mandatory requirement). The first mandatory requirement is clear from the use of the following imperative terms:

A (1) a mandatory term "shall" is used in O. 53 r. 3(1) of the RC; and

(2) Order 53 r. 3(2) of the RC employs the word "must".

The rationale of the first mandatory requirement is to enable the High Court to sieve JRAs and ensure that frivolous, vexatious or
B baseless JRAs have not been filed;

(b) Order 53 r. 3(3) mandatorily requires an applicant to serve all cause papers regarding the JRA on the Attorney General's Chambers (second mandatory requirement). Once again, the Rules Committee has employed an imperative term "must" in O. 53 r. 3(3) of the RC.
C The object of the second mandatory requirement is obvious, *ie*, the Attorney General (AG) is the custodian of public interest and should be informed in writing of any application to the High Court for leave to commence a JRA (leave application). In the exercise of the AG's public functions and duties, the AG has a discretion to accede or
D object to any leave application; and

(c) an applicant has to comply with the mandatory time period to file a JRA (limitation period) as provided in O. 53 r. 3(6) of the RC (third mandatory requirement). The third mandatory requirement is clear due to the employment of an imperative term "shall" in O. 53
E r. 3(6) of the RC. As JRAs concern public law matters, it is in the public interest as well as it is in the interest of the applicants for JRAs to be filed expeditiously. Hence, the purpose of the third mandatory requirement.

If an applicant has exceeded the limitation period, the applicant has
F to obtain leave of the High Court pursuant to O. 53 r. 3(7) of the RC to file the JRA.

[67] In this appeal, the plaintiff should not be allowed to circumvent the three mandatory requirements by filing this suit.

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